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Supreme Court, U.S.
FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES LINDSTROM, *et al.*,

Petitioners,

v.

EDWIN H. ALLEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENTS EDWIN H. ALLEN AND WENDY L. ALLEN IN OPPOSITION TO PETITION

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The Petition filed by Timothy R. McGowan[1] herein seeks review of a decision by the Supreme Court of Virginia granting specific performance of a contract for the sale of land. Mr. McGowan contends that his Due Process rights were violated in the course of the proceedings below. That contention is simply unfounded. The case is governed by the substantive and procedural law of Virginia. It presents no federal question at all, let alone an important or compelling question. The

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[1]Mr. McGowan, an Appellee in the case below, filed the Petition pro se. While Mr. McGowan has included the other Appellees in caption of his Petition, apparently none of the other three Appellees joined in his Petition.

Petitioner failed to inform this Court that neither the Fourteenth Amendment, nor any other provision of the United States Constitution, nor any federal law was even mentioned during the litigation. There is, in any event, no conceivable ground for arguing that there has been a violation of Petitioner's Constitutional rights.

STATEMENT OF THE CASE

The essential facts of this case are set forth in the Opinion of the Supreme Court of Virginia entered April 21, 1989, which is reproduced in the Appendix to the Petition. On March 14, 1985, Respondents Edwin and Wendy Allen entered into a contract with James and Karla Lindstrom under which the Lindstroms were to sell to the Allens a parcel of an undeveloped residential property in Fairfax County, Virginia. The Lindstroms failed to perform their obligations under the contract, however, and subsequently conveyed the property by deed to Petitioner Timothy McGowan and his wife Adele.

The Allens filed suit in the Circuit Court of Fairfax County, Virginia seeking to set aside the deed of the property to the McGowans, and for specific performance of their agreement with the Lindstroms. That proceeding was styled *Edwin H. Allen, et al. v. James Lindstrom*, et al., Case No. 93488. The Allens filed a separate suit seeking an injunction against the McGowans to prevent them from clearing and/or building on the lot. *Edwin H. Allen, et al. v. Timothy McGowan, et al.*, Case No. 93960.

The trial court initially granted the Allens a temporary injunction prohibiting the McGowans from further clearing or building on the lot. The cases were consolidated for trial and, by order entered April 25, 1986, the trial court denied the Allens specific performance of the contract. The Court also dissolved the temporary injunction. It subsequently entered

an order on September 8, 1986, awarding the McGowans damages resulting from the temporary injunction.

The Allens timely filed Petitions for Appeal to the Supreme Court of Virginia of both orders. By Motion dated August 5, 1986, Mr. McGowan moved to have the Petition for Appeal of the April 25th order dismissed citing, among other things, the Allen's failure to comply with Rule 5:11 of the Supreme Court of Virginia. That Rule provides that "[t]he transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment." It further provides for notice of the filing of the transcript to other counsel of record. The Virginia Supreme Court denied the motion to dismiss by order entered September 11, 1986.

The Supreme Court of Virginia granted the Allen's Peti tions for Appeal in both cases. The briefing schedule was completed December 8, 1987, and oral argument was set for February 27, 1989. On February 17, 1989, the McGowans moved the Court to take judicial notice of two decisions of the Virginia Real Estate Board issued September 7, 1988, concerning four real estate agents who had been involved in the negotiations between the Allens and the Lindstroms and between the McGowans and the Lindstroms with respect to the property at issue in the cases. The Allens filed a Brief in Opposition to such motion. By order entered April 21, 1989, the Supreme Court of Virginia reversed the trial court and awarded the Allens specific performance of the Allen-Lindstrom contract. The Court has not entered any orders or taken any action which indicate how it resolved the motion, if at all.

ARGUMENT

1. The Petition Should Be Dismissed, As No Issues of Federal Law were Raised or Decided Below.

The Petition makes what appears to be an effort to comply with Rule 21(h) of the Supreme Court of the United States by describing how certain procedural issues were raised and decided in the Virginia Supreme Court. (Pet. 2-3.) But the petition does not actually assert that those issues were raised or decided below as federal questions. It does not because it cannot. The issues argued by counsel were solely matters of state law, and the Virginia Supreme Court decided the case based solely on issues of state law. This Court, therefore, has no jurisdiction of the case.

2. The Petitioner's Rights of Due Process Were Not Violated by the Decision of the Supreme Court of Virginia Denying Petitioner's Motion to Dismiss Petition for Appeal Based on the Allens' Failure to Give Notice of the Filing of the Trial Transcript Pursuant to Rule 5:11 of the Supreme Court of Virginia

There would, in any event, have been no merit to any claim under the Constitution of the United States respecting the substance of the questions Petitioner presents. The first and second questions stated by Petitioner allege that the Supreme Court of Virginia violated his rights of Due Process by failing to enforce its own Rule 5:11, which provides that "the transcript of a proceeding is a part of the record [on appeal] when it is filed with the clerk of the trial court within 60 days after the entry of judgment," and further requires counsel for the "appellant" to give notice to the other parties of the filing. Petitioner does not allege that the transcript was not timely filed, but only that the Allens did not give notice thereof.

As the Allens pointed out to the Virginia Supreme Court, this case was heard by a Judge Pro Tempore of the Circuit Court of Fairfax County pursuant to VA. CODE §17-9. The parties entered into a written stipulation, endorsed by all counsel of record, in which the parties agreed to the appointment of the Judge *Pro Tempore* and further stipulated that he was "to cause a transcript of the proceeding [therein] to be prepared and [to] submit a written transcript to the Clerk of the Court for inclusion in the file of this cause." The matter was heard by the Judge *Pro Tempore* on February 28, 1986, and his written letter opinion was dated April 4, 1986. App. at 97. In the opinion, the Judge *Pro Tempore* stated that he had reviewed, among other things, "the Hearing Transcript of February 28, 1986." *Id.* The transcript was submitted to the Clerk of the Circuit Court of Fairfax County, and was stamped "filed" on April 8, 1986, the same day that the letter opinion was marked filed in the record. The final order encompassing the matters outlined in the April 4th letter was entered on April 25, 1986.

The transcript was thus filed by the Judge *Pro Tempore* by stipulation of the parties *prior* to the entry of judgment. Rule 5:11 is simply inapplicable. That rule applies only where an "appellant" has caused the transcript to be filed within 60 days *after* entry of judgment. In those circumstances, counsel for the "appellant" must give written notice of the filing of the transcript to all other counsel of record.

The notice provision in 5:11(b) is apparently intended to preserve the right of the parties to object to the transcript under 5:11(d) if they believe it is erroneous or incomplete. In the present case Appellees knew that the transcript had already been filed by the Judge *Pro Tempore*, and that the Judge *Pro Tempore* had reviewed the transcript in preparing his opinion. Appellees thus had ample notice and opportunity to file

their objections to the transcript. Notably, they still do not complain about any specific errors in or omissions from the transcript.

In all events, there is nothing in Rule 5:11 which makes the notice requirement jurisdictional; and lack of compliance provides no basis for dismissal of the appeal. Petitioner relies on *Towler v. Commonwealth*, 216 Va. 533, 221 S.E.2d 119 (1976) for the proposition that the notice of filing is a jurisdictional requirement. *Towler* was decided under the former Rule 5:9, however, and is therefore totally inapposite. At the time *Towler* was decided, Rule 5:9 expressly provided that a hearing transcript only became part of the record if written notice were given to opposing counsel.[2] The current version of Rule 5:11 is structured entirely differently. Subsection (a) reads

> The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment.

Thus, under the present Rule, filing of the transcript is the sole prerequisite to inclusion of a transcript in the record; inclusion in the record is no longer contingent on the notice of filing, which is addressed separately in Rule 5:11(b).

There is no support whatsoever for Petitioner's contention that Rule 5:11 is applicable to this matter. Even if Rule 5:11 were applicable, the question would be what remedy should

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[2]At that time, Rule 5:9(b) read:

> The transcript of any hearing also becomes part of the record when it is filed in the office of the clerk within sixty days after entry of final judgment and is accompanied by a notice identifying the transcript and reciting its delivery to the clerk, to which is appended a certificate that a copy of the notice has been mailed to opposing counsel or acceptance of service of such notice by opposing counsel.

(Emphasis added).

be available for any lack of notice. In the circumstances of this case, no relief is necessary, because Petitioner has not suffered, or even alleged, any prejudice. Petitioner stipulated that the transcript would be filed by the Judge *Pro Tempore*. They were also informed the transcript was prepared, and they knew that the Judge *Pro Tempore* had used the transcript in reaching his decision. Moreover, Petitioner never filed any objections to the transcript, and has not complained of any inaccuracies. In light of the complete dearth of evidence of any prejudice sustained by Petitioner, the alleged lack of notice would be, at most, harmless.

In short, the Virginia Supreme Court was thoroughly justified in proceeding with the appeal, and thereby effectively denying without comment the motion to dismiss the appeal insofar as it was based on an alleged technical failure to comply with the Court's own rule. It is fanciful for Petitioner to suggest that there has been a lack of elementary fairness as the invocation of Due Process implies.

3. The Petitioner's Due Process Rights Were Not Violated by the Decision of the Supreme Court of Virginia Denying Petitioner's Motion to Take Judicial Notice of Two Decisions of the Virginia Real Estate Board

Petitioner argues in his third question that due process was denied when the Virginia Supreme Court, which had before it a complete evidentiary record from the trial court's proceedings, denied Petitioner's motion to take notice of the findings in an administrative proceeding to which none of the parties to the appeal was a party.[3] One can imagine a claim of a

[3]Notably, there is nothing in the record that establishes conclusively whether the Virginia Supreme Court granted or denied the motion; it rendered its decision with commenting on the motion. For that reason alone, this assignment of error is invalid.

denial of due process if the appellate court *did* take notice of the administrative findings in those circumstances, but the contrary claim made here is beyond imagination.

By Motion filed February 17, 1989—11 days before scheduled oral argument—the McGowans asked the Court to take judicial notice of two decisions of the Virginia Real Estate Board ("the Board") issued September 7, 1988, in the matters styled *Virginia Real Estate Board v. Max Rush and Anice Sutherland*, File No. 85-01654 and *Virginia Real Estate Board v. Mary S. Ginty and E. B. Stough*, File No. 87-0025. In reviewing lower court decisions, however, the Virginia Supreme Court ordinarily does not consider matters outside of and not made part of the record. *Newton v. Newton*, 202 Va. 96, 116 S.E.2d 94 (1960); *Darrell v. Barber*, 179 Va. 86, 18 S.E.2d 271 (1942). Obviously, the matters sought to be judicially noticed below played no part in the lower court's decision of the cases. In fact, the lower court's orders were entered in 1986, two years before the Board rendered the decisions that were the subject of Petitioner's motion.

Mr. McGowan makes no effort here, and made no effort below, to explain why the Board's decisions are relevant or neces sary to the resolution of the present cases. He did not contend, for example, that the record was somehow incomplete or inadequate for review of the lower court's orders. Mr. McGowan seemed to argue simply that since "nonjudicial records" *may* be the subject of judicial notice under VA. CODE §8.02-390, the Virginia Supreme Court *should* have made such part of the record. Regardless of any particular theories, however, the motion was unfounded and was properly denied.

The Board's proceedings were between persons and entities which were not parties to proceedings in the Supreme Court of Virginia, and involved issues which were not considered by the trial court. The present cases principally in-

volve the Allens' suit against the Lindstroms and the McGowans for specific performance of a contract for the sale of real property, and for an injunction against further construction activities on the property. The Board's proceedings, by contrast, were focused on whether the four real estate agents involved in the listing and sale of the property violated certain of the Board's regulations. Since the Allens were not parties to the Board's proceedings they had no opportunity to present any evidence to the Board. The Board's decisions thus had no collateral estoppel or *res judicata* effects with respect to the present cases; they are immaterial to this proceeding. *See Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974); *Gordon v. Fairfax County*, 207 Va. 827, 153 S.E.2d 270 (1967); *Patterson v. Anderson*, 194 Va. 557, 74 S.E. 195 (1953). Once again, the due process argument asserted is simply frivolous.

CONCLUSION

For the reasons stated above, the Petition should be denied.

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